

TABLE OF CONTENTS

	PAGE
I. THE ELIGIBILITY CRITERION FOR INDIAN PREFERENCE USED BY THE BUREAU OF INDIAN AFFAIRS DOES NOT INFRINGE ANY CONSTITUTIONAL RIGHT OF APPELLEES _____	2
II. THE INDIAN PREFERENCE STATUTES APPLY TO ALL FEDERALLY-RECOGNIZED TRIBES, AND THIS APPLICATION OF THE STATUTES BY THE BUREAU OF INDIAN AFFAIRS DOES NOT INFRINGE ANY CONSTITUTIONAL RIGHTS OF APPELLEES ____	3
CONCLUSION _____	7

TABLE OF CITATIONS

CASES:

<i>Baker v. Carr</i> , 369 U.S. 186 (1962) _____	2
<i>Mancari v. Morton</i> , 359 F.Supp. 585 (D.N.M. 1973) ____	6
<i>Simmons v. Eagle Seelatsee</i> , 244 F.Supp. 808 (E.D. Wash. 1965), <i>aff'd</i> 384 U.S. 209 (1966) _____	2

STATUTES:

25 U.S.C. § 472 _____	2, 4, 6
25 U.S.C. § 478 _____	3, 4
25 U.S.C. § 479 _____	2, 3

IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-362 and 73-364

ROGERS C. B. MORTON,
Secretary of the Interior, *et al.*, *Appellants,*

—and—

AMERIND,
Intervenor-Appellant,

—v.—

C. R. MANCARI, *et al.*, *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

**REPLY BRIEF FOR
INTERVENOR-APPELLANT AMERIND**

Amerind will not reiterate its arguments on the major issues in this case, since we believe that these are adequately dealt with in our main brief. However, Appellees have raised two new issues. First, they argue that the application of the Indian Preference Statutes to all persons of one quarter or more Indian blood, instead of to those of one half or more Indian blood, is unconstitutional. Second, they assert that the extension of Indian Preference to tribes which voted against certain provisions of the 1934 Wheeler-Howard Act is unconstitutional. We will address these two issues in this brief.

I. THE ELIGIBILITY CRITERION FOR INDIAN PREFERENCE USED BY THE BUREAU OF INDIAN AFFAIRS DOES NOT INFRINGE ANY CONSTITUTIONAL RIGHT OF APPELLEES

Appellees assert that the Indian Preference Statutes are being unconstitutionally applied to them because a preference is granted to persons of one quarter Indian blood rather than just to persons of one half or more Indian blood.¹ Appellees cannot raise this argument now, since they have failed to show, either as individuals or as class representatives, any injury, benefit, or interest in the application of a one quarter Indian blood standard rather than a one half Indian blood standard. Besides, Appellees' argument is not addressed to the constitutionality of the statute, but instead to its construction, and is therefore not an issue before the Court.²

In any event, even if the issue were properly before the Court, Appellees' contention is completely devoid of merit. Section 19 of the Wheeler-Howard Act, 25 U.S.C. § 479 establishes three categories of persons who shall be included as Indians for, *inter alia*, the purposes of the Indian Preference Statute of 1934, 25 U.S.C. § 472:

"The term 'Indian' as used in sections . . . 471-473 . . . of this title *shall include all persons of Indian descent*

¹ See Brief for Appellees at 8, 9.

² Moreover, it has long been held that, "Congress, or its delegated agents, [have] full power to define and describe those persons who should be treated and regarded as members of an Indian tribe. . . ." *Simmons v. Eagle Seelatsee*, 244 F.Supp. 808, 813 (E.D. Wash. 1965), *aff'd per curiam*, 384 U.S. 209 (1966). This Court has traditionally declined to review Congressional or administrative action regarding Indian membership. See *Baker v. Carr*, 369 U.S. 186, 215 (1962).

who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members, who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood." (emphasis supplied).

The first category, unlike the third, does not specify a blood standard. It refers only to tribal membership. Only members of Federally-recognized tribes are eligible for Indian Preference (App. 200). Thus the Bureau's interpretation of the term "Indian" in the application of Indian Preference is fully in accord with Section 479, and, indeed, is narrower than the statute would allow.*

II. THE INDIAN PREFERENCE STATUTES APPLY TO ALL FEDERALLY-RECOGNIZED TRIBES, AND THIS APPLICATION OF THE STATUTES BY THE BUREAU OF INDIAN AFFAIRS DOES NOT INFRINGE ANY CONSTITUTIONAL RIGHTS OF APPELLEES

Appellees contend that it is unconstitutional for the Bureau of Indian Affairs to grant preference to Indians whose tribes voted against certain provisions of the Wheeler-Howard Act in elections called during 1934 and 1935 pursuant to 25 U.S.C. § 478.⁴ Even if this contention were correct, it would not undercut the application of Indian Preference to members of tribes who did not so vote. The argument

* One reason for selecting the quarter-blood test is that many tribes require one quarter Indian blood for tribal membership.

⁴ Brief for Appellees at 10-11.

therefore goes not to the constitutionality of Indian Preference, but rather to the scope of its application. In any event, as the court below concluded, Appellees' argument is incorrect.

The Wheeler-Howard Act inaugurated an extensive reorganization of reservations, tribal governments, and Indian affairs generally. The Act was designed, in the words of its title,

"To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes." 48 Stat. 984 (1934).

Because certain provisions of the Act allowed the tribes to adopt constitutions or corporate charters, the Indians were authorized to vote on these measures, reservation by reservation. See 25 U.S.C. §§ 476-478.

However Section 12 of the Act, 25 U.S.C. § 472, only broadened and confirmed the benefits of previous Indian Preference Statutes such as 25 U.S.C. §§ 44-47 and 274. Section 472 applies to all qualified members of Federally recognized tribes; and is not restricted to any particular reservations. No Indian tribe or reservation has ever rejected the benefits of the Indian Preference Statutes.*

Appellees disregard these considerations, and assert that members of those tribes which rejected portions of the Wheeler-Howard Act more than forty years ago cannot be eligible for Indian Preference. The Court below weighed the arguments and held:

* Testimony of Raymond Gunter, App. 200-201.

"In one of the sections, now 25 U.S.C. § 478, provision is made for submission of 'the Act' for acceptance or rejection by the various Indian tribes. This voting section (478) on its face would appear to make the application of section 472, with which we are here concerned, optional with individual tribes by requiring a special election of the adult members of the tribe to vote on the application of the entire Act.

"The Reorganization Act was submitted and voted on and was rejected by a considerable number of tribes. . . . [T]he other sections, as well as a review of the Congressional history of the Act, convinces us that the elections were to be only for the purpose of accepting or rejecting sections 476 and 477 of Title 25, 48 Stat. 987-88. For example, we cannot believe that Congress intended all the Indian tribes to vote on the extension of boundaries of the Papago Reservation (section 463a, 50 Stat. 536), on the Secretary making rules and regulations for the operation and management of Indian forestry units (section 466, 48 Stat. 986), or on appropriations for vocational and trade schools (section 471, 48 Stat. 985), or on other provisions found in the Indian Reorganization Act. It is difficult to see how under any other construction the Act would be valid.

. . .

"Nothing which followed in the debate or in the way of amendments suggests to us that the option of acceptance was extended to any other portion of the Act, and therefore the preference section here concerned must be held to extend to all Indians as individuals." *Mancari v. Morton*, 359 F.Supp. 585, 588 (D. N.M. 1973), JSA, App. B at 28-29.

. . .

One other matter raised by Appellants requires brief mention. Appellant argues that there has been no showing that having Indian blood in any way relates to the various jobs to be done in the Bureau (Brief for Appellees, at 14). Amerind has not contended that Indian Preference is primarily a matter of job efficiency, but rather that Congress intended it as a means by which Indians—who occupy a unique constitutional position—could move towards the goal of self-determination. *See* Brief for Intervenor-Appellant Amerind, at 29-32, 34-37. Some statistics recently developed by the U. S. Civil Service Commission, attached as Appendix A, demonstrate the compelling need for Indian Preference as a means of achieving this end. They show that in the States of Arizona and New Mexico, Indian employment in the Federal agencies which do not apply Indian Preference—i.e., all but the Indian Health Service within the Department of Health, Education and Welfare, and the Bureau of Indian Affairs within the Department of the Interior—is minuscule and far below the proportion of Indian residents of these states. Plainly, the competitive service requirements act as a barrier to Indian entry into these agencies, and it is only by means of the Excepted Service provisions of Section 472 that Indians can enter the service of their own people. It is difficult to imagine a clearer demonstration of the need for Indian Preference and the related Excepted Service provisions of Section 472 as a tool towards the Congressional purpose of creating “an Indian Service predominantly in the hands of educated and competent Indians.” (*See* Brief for Intervenor-Appellant Amerind at 29.)

CONCLUSION

For the reasons set forth in the Briefs for the Appellants and in this Reply Brief, the decision of the District Court should be reversed.

Respectfully submitted,

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APPENDIX A

Indian Employment Figures in
Federal Government Agencies

	<u>Total Emp.</u>	<u>Ind. Emp.</u>	<u>%</u>
<i>Arizona</i>			
Dept. of Interior	5,018	2,378	47.2
HEW	1,457	768	52.7
Agriculture	1,317	26	2.0
Air Force (civilian)	3,827	15	.4
Army (civilian)	4,954	27	.5
Atomic Energy Commission	913	13	1.4
Defense Supply	314	5	1.6
HUD	77	4	5.2
Dept. of Justice	174	0	0.0
Navy (civilian)	122	1	.8
Post Office	2,578	34	1.3
Transportation	969	7	.7
Treasury	208	2	1.0
Veterans Administration	811	21	2.6
 Total (exc. Interior & HEW)	 16,254	 155	 0.9

Arizona State Population
 1,016,000
 State Indian Population
 72,788
 Percentage of Population
 7.2

	<u>Total Emp.</u>	<u>Ind. Emp.</u>	<u>%</u>
<i>New Mexico</i>			
Dept. of Interior	5,692	2,882	51.6
HEW	2,284	995	43.5
Agriculture	1,439	68	4.8
Air Force (civilian)	4,410	21	.5
Army (civilian)	4,498	24	.5
HUD	137	1	.7
Transportation	366	1	.3
	<hr/>	<hr/>	<hr/>
Total (exc. Interior & HEW)	10,850	115	1.05
New Mexico State Population 1,779,900			
State Indian Population 95,812			
Percentage of Population 5.4			

Source: "The Southwest Indian Report," a Report of the
U. S. Civil Rights Commission, May 1973, at 12.